SHOULD THE LAW TEACHER PRACTICE LAW?

THE law teacher who has done the arduous pioneer work of introducing a new mode of teaching law by case-books is necessarily excused for never having practiced law. It may be conceded at once that he could not have done his pioneer work and become a practitioner at the same time. It may be conceded also that the training of the law teacher which comes from the struggle to make case-books and to introduce teaching by case-books, is a fair substitute for the training which practice at the bar will supply. The law teacher who while still a beginner settles down to the completion of a great work like Wigmore on Evidence is also readily forgiven for never having practiced law. The law teachers of to-day who are over forty or forty-five, and who have never practiced, met the problem of their professional development and training twenty or twenty-five years ago. It is neither becoming nor just that anyone should now in the retrospect say that they did not meet the situation in which they found themselves in the best manner possible. The number of law schools is, however, increasing, especially in the Mississippi valley, the south, and the far west. There is a corresponding demand for law teachers, and the recent law school graduate with a brilliant record as a student is more and more called upon to become a professional law teacher at the time of leaving the law school, or very shortly afterward. The rule is being more and more rigidly enforced that these men shall devote all their time to the teaching of law and shall not practice in any degree. Accordingly these young men are going into law school faculties with no outside distractions whatever. They are assuming that they must live upon their law school salary, and that alone. At the same time these young men have no pioneer work to do in making case-books and justifying their use. Most excellent case-books have been made for them, and the second editions are out. The number of such young men who will, before they are forty, seriously undertake a work like Wigmore on Evidence is negligible. The question is a vital and important one:

What shall these young men who are going into law teaching on the basis of not practicing at all, do to develop their powers? What is the law school most interested in having them do? Shall they practice law in addition to and at the same time that they carry on their teaching?

Let there be no misapprehension about the scope of the general question. It is not: — Shall the law teacher be a practitioner who supports himself by his practice and incidentally teaches in the law school? I assume that question is finally determined in the negative, and that when the law teacher is such a practitioner, the problem is to get him out of the law school or to separate him from his practice. The general question which I propound is quite different. Shall the law teacher who is settled in the position of making his livelihood by his teaching, and while continuing so to do, and while independent of any income he may make from practice, yet endeavor from his office in the law school to secure and maintain a limited position at the bar in practice?

Before this general question can be answered we must (1) define what we mean by "practice," (2) agree upon what qualifications in respect to its teachers the law school is most desirous of developing, and (3) fix the general alternative activity for which practice at the bar is to be substituted.

If by practicing law we mean the usual combination of client-care-taking and advocacy — with the emphasis largely on client-care-taking — which is the leading characteristic of practice in the United States, then I should say, decidedly, the law teacher must not practice, and this paper would here abruptly stop. Taking care of clients, as distinguished from handling litigated cases, is an occupation which will always distract the law teacher from the subject matter of his courses and deprive him of the time which he needs to devote to his courses. A great deal of necessary client-care-taking is not law at all, but mere business. The proportion of legal problems and the volume of work and time spent is too small and spread over too many diverse fields of the law. The more a man succeeds as a client-care-taker, the less valuable he becomes as a law teacher. It is premised, and most emphatically, that if the law teacher is to practice at all, he must rigidly exclude all client-care-taking.

The law teacher must practice, if at all, in the handling of legal

problems and not at all in the handling of clients. He must have *cases* and not *clients*. He must serve the needs of lawyers who have the clients and who employ the law teacher because of his expert and special knowledge and skill in handling litigation. He must not be a brief-writing hack or an authority digger, for that occupation not only does not make an expert specialist in handling legal problems, but it leads to an atrophy of personality which a man of talents and ambition cannot afford to permit. The law teacher may practice in the giving of opinions to other lawyers upon legal problems submitted. But the law teacher's practice must not stop here. He must not be merely the man to be consulted for academic aid. That is only a more dignified stage of the authority digger. The law teacher must be the man who is sought as an advocate, — whose personal skill and power in swaying the mind of the court is in demand. The special field of practice of the law teacher should be in the appellate courts. He should have a practice as special counsel in preparing the printed briefs and arguments and the making of oral arguments before those courts. If, as is frequently the case, these appellate tribunals discourage oral arguments because of the wretched character of those which the bar is now offering, the law teacher should take advantage of the opportunity to make the better sort of oral arguments and to shine by comparison. The law teacher in his appellate court practice should always appear as special counsel. When he is the sole author of the printed briefs and arguments this fact should be made to appear before the court so that the whole responsibility for the conduct of the case will fall upon him. As far as possible the law teacher should take some part in the more difficult work of handling litigated cases in the trial court, where the ultimate result depends much on the way the case is tried below and how questions of fact are handled. In all his practice, of whatever sort, the law teacher should rigidly impose upon himself the rule that he will not deal directly with clients. This will place him above the slightest suspicion of ever using his position to secure for himself the clients with whom he has come in contact in his work for other lawyers. The law teacher's practice must be to some extent specialized, and very naturally in the line of the subjects which he teaches.

Practice in this restricted sense — handling legal problems and litigated cases instead of the miscellaneous affairs of clients —

we will call, for want of a better name, advocacy. The law teacher who practices thus we will speak of as the law-teacher-advocate.

What qualities is the law school most interested in developing in its teachers? The law school is primarily interested in developing the most effective law teachers — men who can handle a class successfully, determine what problems are vital, what views are sound and impart these views to the students. It wants also men who are or who may become successful original thinkers — leaders in the promotion of ideas which are to be a factor in the development of the law. It wants also men who during their active life may contribute some social service in the cause of law reform. Each individual school is interested in securing law teachers with the above qualifications, who will not leave that particular institution for another because a few more dollars of salary is offered.

The question of whether the law teacher should practice is of course a relative one. Clearly he should practice as an advocate, rather than not do anything at all except meet his classes. The real question, therefore, always is: Shall the young law teacher practice as an advocate rather than do something else? What is that "something else"? Clearly it is not the pioneer work of making case-books and establishing a new system of teaching. That has been done. Clearly it is not the preparation of a great work like Wigmore on Evidence, for experience shows that that is too exceptional an achievement. It is the revising of case-books, keeping up with recent decisions from all over the English-speaking world, writing the average number of law review articles, preparing text-books or encyclopedic articles of a dignified character and substantial proportions. This is a fair description of the usual activities of the present-day law teacher, who, as the phrase goes, "is giving all his time to the law school."

The specific question at issue has now become this: Will the young man of to-day, fresh from honors at a law school, who becomes a professional law teacher and who spends the first fifteen or twenty years of his life as such teacher in securing and maintaining a position at the bar as an advocate, be more apt in the long run to become a teacher with the qualifications which the law school wants, than the man who, during the same period, leads the usual life of one who is giving all his time to the law school?

There are two principal reasons for answering this question

in the affirmative and several less important ones: *First*, the time has come when the demand is not for mere speculation as to what the general law is or ought to be, but for the testing and establishment of the speculations of the great teachers already made. The law teacher should practice as the means of bringing his own and the speculations of the masters as to what the law is or ought to be to an actual test in the laboratory of the courts. *Secondly*, the law teacher should practice in order that he may obtain the training and experience which comes from conflict with the minds of mature men quite as acute, if not more so, than his own.

Let us consider the first of these two principal reasons.

Langdell said that law was a science. This meant that the rules of law were to be induced from cases as the principles or generalizations in the natural sciences are induced from observation of particular data. If the cases are the complete data, then the reaching of the principle is only a matter of skill in analysis and logic. If the cases be incomplete in any considerable degree, analysis and logic, however skilfully used, result only in speculation based upon partial data. If the scientific method be still pursued, these speculations must be verified and tested by experiments in the laboratory of the courts.

So long as the law was regarded as the rule established by the English cases, the data from which to derive principles might well be regarded as largely complete. There was then demanded of the law teacher great skill in analysis and logic. But the moment one is projected into half a hundred different jurisdictions, each with woefully incomplete data from which to ascertain what the law is, and each with a court ready to declare the law in a particular case by reference to conflicting data elsewhere, assertions as to what the principle of law may be or should be become to a large extent mere speculations founded upon partial and imperfect data. The speculations may be most illuminating and in every way worthy, but they do not become scientifically reliable till they have been proved and adopted by the courts.

Professor Langdell's work was more in the way of analysis and logical inference from the fairly complete data of the English cases to principles which they established. Professor Ames, on the other hand, gave us to a greater extent brilliant speculations as to what the law ought to be, based upon data which were partial and

incomplete for any particular American jurisdiction. Professor Ames' contemporaries have done and are doing the same thing. It may fairly be said that it is the aim of law teachers generally to continue the speculations which Professor Ames and his colleagues began, and that the accepted ultimate function of the law teacher is to further this process of speculation. It is these speculations which make what we now call "general law." This body of so-called "general law" is merely professor- or text-book-writer-made-law. Its principles are, in any particular jurisdiction where the data of cases are incomplete, mere speculations as to what the law ought to be.

In the hands of men who were great enough to found a new system of teaching and construct case-books giving new life to legal principles, the making of great and valuable speculations as to what the law ought to be for American jurisdictions was natural and to be expected. The great speculations were the crowning effort of a life of immense labor in the making of case-books and the struggle to develop principles. We are, however, entering upon a period where the speculations are apt to become decadent. The law teacher of to-day is making his speculations too easily. He has too much license to speculate without the labor most necessary to make his speculations valuable and enlightening. The prevailing attempt to follow Professor Ames as an ideal, without its being necessary to do the pioneer work of making case-books, inevitably leads to a flood of easy speculation which is even now bringing all speculation into contempt. I am sure the younger law teacher of to-day is constantly more and more aware of the suspicion in which judges and lawyers hold his so-called theories. This is the same suspicion which a physicist would invite who advanced hypotheses from imperfect data and then did not take the trouble to subject them to such tests as were available in the laboratory. The suspicion is merited. Speculation without proof cannot be permitted to go on indefinitely. The first generation of teachers after Ames and Langdell and Thayer are in their prime. It may be all right for them to carry on their speculations under the guise of statements of "general law." But to permit the second generation of teachers from Ames and the third generation to continue in the same way spells decay and disaster for the law teaching profession. The young men who are entering the law teach-

ing profession to-day must begin to subject the speculations of their masters and themselves to proof by bringing those speculations to the test of actual litigation in the courts.

We know that Professor Ames hoped that by text-books the great speculations of the men of his generation would be brought to this test. That hope has not been fulfilled, nor is it likely to be. In any event such books only reduce to more permanent form the speculations of the masters. To bring these speculations to the real test you must have men, — men who have convictions and enthusiasm and who can fight skilfully. Professor Gray has reduced many of his most valuable views to permanent form in text-books and articles, and yet it takes men who are on the firing-line of actual litigation in a given jurisdiction to bring them to the proper test in the courts of that jurisdiction.

Professor Ames believed also that his students would be the men to make the fight for his speculations in the several states of the Union. If, however, he thought that the ordinary student who went out into client-care-taking and all the miscellaneous activities of legal business would ever bring his theories to the test in the laboratory of the courts he was much mistaken. Even a man fairly active in litigation may not be an especially effective advocate for the speculations of the masters. The second and third generation of law teachers from Ames are the students of Ames and his colleagues, whether they sat under them personally or not. They are the selected ones to bring the great speculations of the masters to the test of actual litigation in every state of the Union. These men can specialize in the handling of litigated cases and in the handling of cases in related groups of subjects which will give them an intimate experience with practically every important legal problem which arises in those subjects.

The foremost and fundamental reason why the young law teacher of to-day should accept and act upon the principle that he must secure and maintain a position at the bar in practice in a particular jurisdiction is this: There is an actual demand for the curtailment of speculations as to what the law ought to be. There is on the other hand a correlative movement for the promotion of direct efforts to bring the great speculations of the recent past to the test of experience in the courts and to secure their establishment in the law. These steps are imperative for the preservation of the

speculations of the masters and for the keeping up of the standard of legal education and the position of the professional law teacher. The law teacher is the man to answer this demand.

The second principal reason why the young law teacher should practice law is that such a practice as we have described will give him a training which must react most favorably upon his work as a teacher. This will, I think, be readily conceded. The law teacher will, in the preparation of cases for hearing, especially when these cases are to a considerable extent confined to the subjects which he teaches, work out with unusual completeness the legal problems arising in the courses which he teaches. Such researches, stimulated by arguments in the courts, will tend in an extraordinary degree to keep his courses fresh and vital. It will be conceded also that the law-teacher-advocate will certainly have the value of his opinions and the soundness of his learning and judgment in forecasting what courts will do, brought to the awful test of actual litigation and analysis by lawyers and judges quite as able, if not abler, than himself. He will find himself arrayed against eminent counsel and before a court, to defend premises which he may be assuming as a matter of course in the class room. But, more than this, he must develop a learning and ability which will satisfy, not the layman who picks out a lawyer often from motives of personal friendship, but other lawyers who are critically canvassing the bar for a competent junior or a winner in an important case. It must be conceded also that our law-teacher-advocate will acquire a valuable first-hand knowledge of how courts think and operate. He will acquire power in the accuracy and soundness of his thinking, and effectiveness in his mode of expression. Experience as an advocate will not only assist the law teacher to sound and matured views respecting the law, but it will give him an unusual degree of effectiveness in handling a class. It will furnish a sound basis for social service in law reform, and cannot but have a beneficial influence in guiding the development of the original thinker and the solution of ultimate problems.

There are, however, some other advantages (of perhaps less importance) which will come to the law school by reason of the fact that its teachers practice as advocates.

The effort of the young law teacher to secure a position at the bar will make his final success as a teacher and a scholar more

worth while to him and the law school by postponing the achievement of that success and making it appreciably more difficult to obtain. The young law teacher of to-day is succeeding too easily and too quickly. His case-books are made for him. The analysis of the cases which he uses has been taught him while he was a student. In ten or fifteen years a fairly industrious man may have taught a considerable number of courses creditably. He may have revised a case-book and done his share in writing law review articles and student's text-books. He may have been in quick succession a member of several different law school faculties at a constantly increasing salary. He may even be called a conspicuous success as a teacher giving all his time to law teaching. But he has succeeded too easily and too quickly. He has nothing before him. If he is in reality a man of energy and ability, at forty or forty-five life as a law teacher will become empty and stupid. He will begin to look for a law school deanship or the presidency of a university where he may find a new field for his talents and energies. The man most apt to be thus spoiled as a law teacher is the very man of energy and ability which the law school wants to keep, and from whom the law school expects some unusual work in the last twenty years of his life. If the same man had, during the first ten or fifteen years of his life as a teacher, been striving to make a position at the bar for himself as an advocate he would at the age of forty or forty-five have been just beginning to succeed both as a teacher and as a lawyer. He would be just beginning to enter upon the most productive years of his life as a teacher. The chances that the law school would obtain from him some services of unusual worth would be good indeed. His views would be matured and his judgment ripened by his experience as a teacher and as an advocate. He would probably be a man with deep convictions about the law.

The demand of the law school that the young law teacher of to-day shall practice as an advocate, and the assistance of the school and his older colleagues to that object will have an excellent effect in attracting to the teaching profession the law school graduate who is the most able in the handling of legal problems. These men are really fitted for becoming advocates. They almost always look forward to a professional life where they will present to real courts solutions of legal problems like those that they handled in the law school. They really expect to practice as advocates. Then comes

the awakening. They find that client-care-taking and brief-writing hack work have swallowed them up. Neither road leads to advocacy. The more clients they have the more sure they are to throw away their case-books. The continuous doing of brief hack work leads to an undesirable atrophy of personality. In both directions lies disappointment for the brilliant law student. If, however, it once becomes known that law teaching and a position at the bar as an advocate go together, a large number of able young men who now shun law teaching will become eager competitors for the places in law schools in the jurisdictions where they wish to practice.

Law faculties cannot be brought to a high standard of excellence unless there is some means whereby the less efficient can be eliminated and replaced by the more efficient. Change which results in replacing one man with another just as good is, for a time at least, unfortunate. Change which results in the replacing of an especially able man by a less efficient one, or one who because of youth and inexperience must be developed, is a calamity. Yet this is precisely what is happening to-day in many law schools which cannot pay the highest salaries. Their most promising young teacher is being called to some other school at a few dollars more a year, and he is going. These schools have constantly to face a condition where the less promising men stay and the more promising ones go. It may, however, be predicted with a fair amount of certainty, that the younger law teacher who is struggling with some chance of success for a place at the bar as an advocate, and the older teachers who have made such a place, cannot be induced to leave the school to go to another jurisdiction for a few hundred dollars a year higher salary. It is doubtful whether anything another law school has to offer would induce such men to leave. In rare cases, no doubt, where the law teacher who has been successful at the bar as an advocate wishes to retire from practice entirely and devote himself to some ultimate work of scholarship, and a position carrying an excellent salary and high honor is offered him, he will accept it. But even in the rare case, where such a loss occurs, the law school will have had many years of valuable service from an eminent man. It will thus turn out that the only men which another law school can ordinarily secure for a slight increase in salary will be those who have obtained no position at the bar as advocates, or who, though trying to obtain such a position, see little or no prospect

of success, or who do not care for such a position. In most instances the law school can well afford to lose these men and replace them with men who can secure a position at the bar as advocates. The net result will be that schools which, as a general rule, require their young teachers to secure a position at the bar as advocates will in the long run keep their more aggressive and efficient men and lose their less efficient. By this means its faculty will in time be brought to an exceptionally high degree of efficiency.

So much by way of argument may be conceded in favor of the young law teacher of to-day endeavoring to secure and maintain a position at the bar as an advocate, instead of leading the life which is summed up in the phrase "devoting all his time to teaching." On the whole it will probably be admitted that the law teacher who receives a training as an advocate will be more apt to have those qualities, which the law school is interested in securing and developing, to a greater degree than the man who has never practiced but has given all his time to teaching. It may even be admitted also that he will more effectively serve the law teaching profession and the cause of legal education. The real argument against the law teacher practicing will be that there are insuperable practical objections to it. First, it will be urged that there has as yet been no division at the bar in this country — that there is no established professional lawyer's lawyer, or advocate, or barrister. Hence it will be argued that the law teacher could not become an advocate if he wanted to and had the time and ability to succeed greatly at it. It will be objected, secondly, that the law teacher has no time to practice. Finally, it will be said that the law teacher who succeeds as an advocate will leave the law school and devote all of his time to practice.

Let us consider the first of these objections:

It is true that there is as yet no well-defined division at the bar in this country and no well-defined profession of advocacy. But it does not follow that practice as an advocate is impossible. If there is an economic demand for such a division at the bar and for the professional advocate or lawyer's lawyer who is to practice as an expert and specialist in the handling of litigated cases in the courts, then such a position is open to the law teacher as much if not more than it is to anyone else. The fact that there is little actual competition may indeed give the law teacher an opportunity

now which he will not have a generation hence. The economic demand for the advocate has arrived, and in the large centers of population is so insistent that it must be answered in some way. Client-care-taking has become so absorbing — especially in large centers of population — that lawyers who are most successful in having clients no longer find it convenient or profitable to handle their litigated cases for them. They have had to give up studying law. Their object is to find out enough law to steer a safe course and keep their clients out of litigation and settle their cases. This they do more and more by pushing a button and calling upon a clerk in the office. But that knowledge of how courts are going to solve or ought to solve the more important and difficult legal problems and how important litigation involving these legal problems is to be conducted cannot be obtained from the hired underlings of the client-care-taker. The demand for the advocate or lawyer's lawyer who is a student of the law and who is an expert in the conduct of litigation is here. This, together with the fact that there has been a rather slow and unintelligent answer to the demand in very narrowly trained and often poorly equipped specialists, gives the law teacher with his broader and more scholarly training an opportunity which should not be underestimated.

It is of course not enough that there should be an opportunity for the law teacher to succeed as an advocate. He must to a certain extent make a special preparation for the advocate's work. But this is well within the reach of successful law teachers in a comparatively few years.

It is essential that the law teacher should master to an unusual degree the state of the local law on some principal subject or group of subjects which he teaches. I had almost said that he must learn some real law as distinguished from what a very talented law teacher recently called "Cloud Cuckoo Town Common Law." I am sorry that the law teacher will be obliged thus to soil his mind with the parochial declarations of a given state supreme court. He ought, however, to master the local law on one principal subject or group of subjects in from four to eight years. All this time he can be teaching and becoming more proficient in the general law by reason of the criticism he may find it necessary to level at the local law. Having once mastered the local law and obtained thereby a foothold in practice, he will find himself constantly bringing to the

test of actual litigation in the courts his own and the speculations of his masters. In his own phraseology he will be constantly dealing with problems of "general law."

The law teacher cannot, however, stop with the collection and analysis of materials which make him a master of the local law. His proficiency must become known to the local bar. A legitimate, dignified, and effective way in which this may be done is for the law teacher to write a book or books and articles dealing with the state of the local law and its special and peculiar problems in the subjects which he teaches. He will be judged by these books and articles. If they are what they should be, bench and bar alike will use them. The author's position at the bar will then be in some degree assured.

There is nothing unusual about this prescription for securing a position at the bar as an advocate. It is the same as that which has been written generation after generation for the briefless young English barrister. The list of books collecting, analyzing, and criticizing the parochial deliverances of the English judges written by young men who have afterwards become leading barristers and eminent judges is familiar to all. Many more have been written by men who obtained fair but not conspicuous positions at the English bar.

Another thing that the law teacher who would practice as an advocate must do, is to stay in one place. Once over the line into another jurisdiction and his foundation of expertness in the local law and his relations with the local bar built up during several years are at once shattered. I think it was one of Roscoe Pound's rare pieces of good fortune that he was not induced to leave Nebraska till he was ready to give up practice.

The second objection to the law teacher practicing is that he has no time for it. I think this is the reason which weighed most with Professor Ames. He believed that practice was a distraction to the teacher. He no doubt saw clearly that in general a teacher could not do the pioneer work of making case-books and introducing the case-book method of teaching and also practice. To that I agree. Then "practice" to Professor Ames meant, I think, only one thing — that was the American combination of client-care-taking and advocacy, with the emphasis too often upon the client-care-taking. He saw that client-care-taking was inconsistent with the

functions of a teacher. Again, I agree. The moment, however, that we select for the law teacher a position at the bar as an advocate, with the client-care-taking eliminated, and when we reach a point where it is more important that speculations as to what the law ought to be should be proved and tested than that they should be made, we have really presented a situation about which Professor Ames never expressed, or, as far as I know, had any opinion at all.

A priori it seems reasonable that the securing of a position at the bar as an advocate should not be at all impeded by lack of time. The probable course of events will be something like this: For the first five or six years after the law teacher has graduated from the law school and taken up teaching he will be studying up his courses, mastering the local law, and writing a local-law text-book on some principal law school subject which he teaches. Is that too much to ask? Is there anything in this inconsistent with his law teaching? During this period, of course, there will not be any practice. He will be as clearly giving his whole time to the law school as some man who never practiced and who never expects to. If our young law teacher gets into any litigation towards the end of his first five years' teaching, it will be as a junior or "devil" without pay. The case will very likely be for some social service organization which is testing the constitutionality of some act of the legislature or aiding in the enforcement of some civil service or primary law. It may be a desperate case for some poor person who can offer only a contingent fee. In the next five years our law-teacher-advocate may be expected to impress other lawyers with his knowledge of the local law and his ability in solving difficult problems upon which the local courts have not yet ruled. His capacity and judgment as an advocate will be tested and developed with each case that he may handle. He may at the end of ten years have six or twelve litigated cases a year, involving important and difficult problems. The actual number of hours spent in court in these cases may be so slight as not to be noticed by the law school at all. If three of the cases are heard between June first and October first, and six are scattered through the rest of the year and take one day each, and half of these fall on days when the law teacher has no classes, the actual absence of the law-teacher-advocate from his classes on account of appearances in court will hardly be remarked.

The fact that in all the appellate courts the arguments are strictly limited to an hour or two hours on a side is a great aid to the law teacher's practicing in these courts without any interruption of his class-room work. The principal work of the law-teacher-advocate will be in the way of preparation of his cases for hearing. This will not differ in character from much of that which must be done in compiling a text-book or in doing extra work in the preparation of courses.

So far there can be nothing to cause anyone to say that the law teacher has not time for both teaching and practice as an advocate. If, however, the law teacher is fairly successful as an advocate, the opportunities for practicing his profession of advocacy will increase after he has been at the bar for ten or fifteen years. It is then that he will find opportunities to practice, which, if accepted, will make teaching difficult. At this point the law teacher may raise his fees and thus discourage retainers, or he may reduce his hours of teaching from seven a week to five a week, or even four, or he may do both — depending upon how great a success he has made. I do not know what steps Professor Gray has taken, but I believe he has for over thirty years given four hours a week at the Harvard Law School. I can hardly imagine any but a practice as an advocate in long civil and criminal jury cases that would prevent the devotion of that much time to the work of a law school. In this way it is perfectly feasible for the law teacher to go on teaching and practicing for the rest of his life. But if at the age of forty-five he has tired somewhat of practice — if the bench seems, as it well may, unattractive — if he has exceptional capacity for scholarship, he may move in the direction of giving up practice entirely in order to enter upon some ultimate field of authorship.

The last objection to the law teacher practicing is that he will succeed as an advocate and leave the law school entirely. No doubt this will happen. It is now clear, however, that it will not happen till the law teacher has reached forty or forty-five and been teaching for fifteen or twenty years. If at the end of that period the law teacher so conspicuously succeeds as an advocate that he can give up teaching entirely, the law school will have had many years of service from a more than usually able man.

But it by no means follows that because the law teacher becomes a successful advocate at the age of forty or forty-five he will at once

abandon law teaching. Success as an advocate means hard work — often requiring the physical powers of a man under fifty — and, except in the rare case, very moderate fees. It is quite possible for the successful advocate to tire of practice. The logical place for such a man is the bench. But under present conditions in this country such places are hopelessly unattractive. The short terms of office, the necessity of standing for election and consequent dependence upon extra legal political machines for a nomination, and the political landslides which throw the judge out of office without any reference to his merits as a judge, are not the only unattractive features of a judgeship. The rotation by judges in the trial courts among all sorts of cases, civil and criminal jury trials, trials at law and in chancery without a jury, appellate court hearings, and juvenile court hearings, absolutely prevents the judge from becoming expert in any branch of his work. Association also with a considerable number of other judges who have no real head, in an endeavor, with the minimum amount of organization, direction, and judicial power, to dispose of immense dockets of cases in a large center of population, is something that the able expert with ambition will be pretty sure to shun. In the highest courts of appeal the great amount of closet work in examining briefs and abstracts and writing opinions will make places in such courts unattractive to many. I believe that when the law-teacher-advocate tires of practice, he will, in many cases, be well satisfied to drop practice for the law school rather than leave the law school for practice or the bench. Ezra Thayer and Roscoe Pound are conspicuous examples of men who have, after fifteen or twenty years of practice, preferred to give up practice entirely for law teaching. If the law-teacher-advocate does not give up practice entirely for teaching, he may at least be expected to continue his teaching in some degree to the end of his active life.

The law school may very properly expect that teachers who work into practice as client-care-takers will very soon drift out of teaching. But it need fear no general exodus of those who succeed in practice solely as advocates and counselors.

A law school with a faculty composed of young men, which was attempting in a practical way to build up a teaching staff in which each man was doing his part towards securing a place at the bar as an advocate, would be one where the subjects taught were divided into groups with as much regard as possible to special fields of prac-

tice; where the best case-books on the general law were used; where the teachers were in the process of mastering, or had actually mastered, the local law in their respective subjects and were preparing to publish, or had actually published, text-books on the local law of those subjects; where the teachers were writing for a local law review special studies in the problems of the local law and notes to recent cases decided by the local supreme court; where the teachers were busy with local law reform, and mutually supporting each other in the effort to obtain from other lawyers employment in the handling of litigated cases raising for the most part questions in the subjects of which they had made a special study; but where the mastery of the local law and practice as an advocate were regarded not as an end in themselves, but only as the means of bringing to the test of actual experience in the laboratory of the courts the speculations of themselves and their masters and as the preliminary training for an ultimate function as a scholar.

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NOTE. — The utterance of a gifted teacher as to his calling moves a fellow-worker in the same field to join in the discussion, even if it be only to agree or to throw the emphasis a little differently; and the editors have kindly allowed me to add a few words to Mr. Kales's interesting article.

Much that is fundamental in his argument calls for nothing but cordial approval; as, for example, his elimination at the outset of the practitioner whose teaching in a law school is incidental to his practice. The theory of legal instruction represented by such methods is as remote from present conditions as are the days when Judge Story could divide his activities between the Supreme Court of the United States and the Harvard Law School without injustice to either. Mr. Kales's recognition that teaching law demands and deserves all that is best in a man, and that the teacher should renounce all practice which will not make him a better teacher, is wholesome and inspiring. This principle naturally prohibits "client-care-taking"; and with it must inevitably go any substantial trial practice. Mr. Kales does not in terms make this last application. Indeed he recommends participation in trials "as far as possible." But the whole burden of his argument concerns only questions of law and appellate tribunals, and the limitation to what is "possible" renders unnecessary any disagreement with him about trials. The uncertainty when a trial will begin, and once begun when it will ever end — the conflict between the imperative demands of a trial court, and the no less imperative necessities of a fixed teaching schedule — these matters of detail are enough of themselves to show the impossibility of combining a trial practice with proper teaching. Accordingly we do not reach the question how much more serious an encroach-

ment on the teacher's time is made by "client-care-taking" than by the wakeful nights of trial practice, and its absorbed and exciting days.

So far, therefore, no conflict with Mr. Kales's views suggests itself. The advocacy which he recommends consists in arguing questions of law, and there need be no hesitation in recognizing that he marks out for the young teacher an interesting and worthy career. In some part, at least, what he desires must come about of itself, and without any special effort of the teacher, if he is the right kind of man, and if the law school occupies its proper place in the community. If so, he cannot fail to be consulted as an authority in the subjects which he teaches. Such consultations will help to keep him in touch with the bar and with affairs, and they may very naturally call him into court. Whether they do this last or not they cannot fail to enrich his experience and increase his value to his pupils and to the institution which he serves. Only a very narrow view of teaching would condemn such practice as this.

But whatever the merits of the proposed programme for *some* teachers, of course it is not to be recommended for all. Since teachers of law are not so free from individual variation as to realize in fact the ideal standard of uniformity presented by our familiar friend the "ordinary prudent man," it would not be seriously suggested by so sensible and acute a writer as Mr. Kales that any particular scheme of life would fit all cases. On the contrary he takes note of several worthy substitutes for his proposed work of advocacy, for one of which at least — the production of treatises of the highest class — the need is crying. His recommendations, which are addressed only to teachers beginning their work immediately on graduation, must therefore be still further limited to a particular class among such teachers. What are the characteristics which bring a man within that class?

First and foremost, as we are told, he will not "seriously undertake" the preparation of even a single really great treatise. This is a circumstance which calls for attention. Why has he made this choice? Is it because he cannot hope to equal the great work which Mr. Kales names? Surely it is a sorry thing if a young man beginning his career is to set his ideals no higher than his probable attainment. If he is at all worthy of his calling does he not at least hope to master some one subject? The mastery of any head of the law is no doubt a great ambition, but his choice of a profession has given him this ambition as his right, in exchange for what he sacrificed in the choice. Moreover he fairly pledged himself to it when he gave himself to teaching, for "the main secret of teaching law, as of all teaching, is what Socrates declared to be the secret of eloquence, understanding your subject." [1] Should he not then in due time make a record of what he has accomplished? Falling short of his full purpose he may at least make some contribution of permanent value to the law. This without more is a high privilege — why does he reject it?

It begins to look as if something were lacking in this young man. When he chose to become a teacher, and therefore a student, of the law, we were justified in hoping that he was a scholar. At least we had a right to expect of him a love of the law, a clear head, intellectual tastes and capacity, and an appetite for hard work. The suspicion that some of these things are missing is soon confirmed. We find that he "is making his speculations too easily"; "judges and lawyers hold his so-called theories" "in suspicion"; and his "speculations" are of such a kind that there is even an "actual demand" for their

[1] 9 HARV. L. REV. 175.

"curtailment." [2] Perhaps it was a tendency toward such easy "speculations" which turned him aside from the harder path of true scholarship. At any rate, the defect is likely to grow upon him unless he takes steps to cure it, and Mr. Kales's prescription seems excellently chosen. The need for it was serious. No mere tonic was called for, but radical and vital measures; for we presently learn that but for this relief he would, on reaching forty-five, have found life as a law teacher "empty and stupid." Whatever doubt this may suggest whether he chose his profession wisely to begin with, there can be none as to the wisdom of Mr. Kales's remedy.

Suppose now that the teacher is a scholar, or at least has the natural equipment which we have reasonably demanded of him. How will the case be then? Infinitely various, of course, according to the nature of the man; but some general truths can be stated.

In the first place, his spare time — the subject matter of the whole discussion — may not be so great a matter after all. It is not even conceivable that he could "not do anything at all except meet his classes." The mere preparation for his class-room work will itself be a large matter. He will constantly find that what came to him from his teachers, no matter how learned or skilful they were, cannot be made vital or helpful by him until he has passed it through his own mind, and seen it for himself, in his own way. How to present it most helpfully is a problem which will bear indefinite thought and show him indefinite opportunity to improve on himself if he only try hard enough. The constant discussion which he will encourage outside the class room with those fellow students of the law whom it is his privilege to teach will take up much time, but time well spent for him in clearing and ordering his thought. As has been truly said, teaching law if "fitly performed, calls for an amount of time, thought, and attention bestowed on the personal side of a man's relation to his students which instructors now can seldom give." And so the spare time is already contracting.

Such as it is, how will it best be occupied?

First and foremost comes the attempt to make himself a master of the subjects which he teaches. This is a vast enterprise, if rightly undertaken, and he is fortunate if in a lifetime he can complete the study and exposition of a single subject. If he can, other subjects will always supply him with more worlds than he has time to conquer. And so his spare time has already disappeared, and our problem with it. What remains is only an unending struggle to decide which of many things that call to be done shall be sacrificed to the next. Daily the teacher's thought, stimulated by the thought of his pupils, brings him on dark corners hitherto unexplored. Daily, as he seeks to bring light into these

[2] Lest my quotations may seem to misrepresent Mr. Kales's position, let me say that I do not clearly understand his use of the word "speculation." It seems to embody theories of the nature of law which cannot be discussed here; but it must be used in a very special sense indeed to justify the position that "the accepted ultimate function of the law teacher is to further this process of speculation." Whatever its meaning, it has unfortunate question-begging possibilities. It suggests at once an aloofness from realities and from practical considerations pointing to a poor common lawyer, and a neglect of careful and thorough investigation pointing to a poor student — thus doubly justifying the "suspicion" of "judges and lawyers." And at times its use even seems to endorse a study narrowed to the law of a single state rather than enriched by comparison of its development in different jurisdictions.

recesses, he finds them opening into unsuspected inner caverns, rich with material of endless fascination, but also of endless labor. The great advantage which belongs to the teacher of dealing with some head of the law as a whole carries with it the inevitable penalty that in so wide a field these problems, calling not for "speculation" but for scientific and painstaking investigation, will disclose themselves faster than they can be solved, and will lead him into more paths than he can follow. These paths will diverge widely according to the nature of the subjects with which he deals. They may lead into historical investigation of our own early law, the study of "the day before yesterday in order that yesterday may not paralyze to-day, and to-day may not paralyze to-morrow." Or perhaps he must scrutinize foreign systems for the light which comes from a comparison of them with his own. Or his work may call for an intimate knowledge of modern economic and financial conditions, and of the business and political movements of the present day. As these alluring opportunities for study present themselves and compete for his attention, two things at least are certain. There will be no occasion for "suspicion" or "curtailment" of the product of sound work rightly done; and the doer of it will run no risk of finding life "empty" or "stupid."

The subject of our discussion, the teacher's spare time, has long since vanished, but not so the demands upon it. There are the constantly increasing calls which come to him, as his authority in his subject becomes recognized, from other lawyers and from public officials. He will find himself yielding to these from a sense of public duty, or a desire of helpfulness, regardless of the sacrifice of his time. Often they will come from his former pupils, who are testing his "speculations" in the "laboratory" of the courts, and the habit of putting himself at their disposal will prove too strong to be resisted. There is his duty, which Mr. Kales does not overlook, to serve the cause of law reform, and anyone who has worked on Bar Association committees knows the infinite capacity of such work for the consumption of time. There are other public and civic duties, manifold and miscellaneous, which the community will not fail to bring to his attention. Amid all this he will greatly desire (whether he can find time to gratify the desire is another question) to keep abreast of the current decisions in English-speaking countries, and watch the live growth of the law in the wonderful and never-ending variety of facts. And before he has had a chance even to consider the claims of society and his family, the problem has resolved itself into the central tragedy of life — that there are only twenty-four hours in the day.

I do not mean to overlook the advantage that a teacher may derive from having practiced at some stage of his career. Mr. Kales justly emphasizes this. And he has done a valuable service in showing how a young man may take up teaching immediately after graduation and may yet not lose this advantage. But in a well-balanced faculty the work of the various members will differ as widely as the men, and it would be a mistake, by any undue emphasis on practice, to undervalue the great work of legal scholarship which is peculiarly the teacher's province. Even when the teacher appears in court to argue questions of law which have come to him as an expert in his own subject, it is none the less true that every hour given to advocacy is taken from study which may be made most valuable to him and to the law. Mr. Kales says that the number of great treatises produced by professors has disappointed some expectations. But why is this so? Only because time was lacking for

the work. Those who knew Mr. Ames and his colleagues of the last generation know well that their failure to produce more such treatises was due to nothing but their deliberate choice, amid conflicting demands on their time, to serve their pupils and the law in ways not less real because more self-effacing. To plant the seed from which the great treatises of another would grow gave them the same satisfaction as if the work were their own. In their case at least no one would regret the use they made of time which might have been given to advocacy. And the teachers of the next generation will be fortunate if the advantages which have come to them through the work of their predecessors will give them even a fair chance in a single lifetime for the adequate study and exposition of their subjects.

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